No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

ROBERT BERNAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a defendant's waiver of the right to appeal which explicitly permits appeal of a sentence that "exceeds the applicable statutory limits set forth in the United States Code" bars an appeal of an unlawful restitution order.

PARTIES TO THE PROCEEDING

The petitioner is Robert Bernal, Jr. He is presently incarcerated by the United States Bureau of Prisons at FCI Gilmer, located in Glenville, West Virginia. The named respondent is the United States of America.

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Petitioner, Robert Bernal, Jr., respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The order entered by the Court of Appeals for the Third Circuit summarily affirming the judgment entered in this case is attached as Appendix A. The Third Circuit denied en banc review without an opinion on March 2, 2020 in an order attached as Appendix B. The sentencing transcript, reflecting the district court's ruling on Mr. Bernal's objection to the restitution order is attached as Appendix C. The amended judgment reflecting the $5,250 restitution order entered in this case is attached as Appendix D.

JURISDICTION

The judgment of the court of appeals, denying en banc review, was entered on March 2, 2020. Based on this Court's March 19, 2020 order extending the time to file petitions for writ of certiorari due to the COVID-19 pandemic, Mr. Bernal's petition for writ of certiorari is timely, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

In relevant part, 18 U.S.C. § 2259 authorizes restitution orders in the full amount of the victim's losses in cases where "the defendant was convicted of trafficking in child pornography," where "victim" is defined as "the individual harmed as a result of a commission of a crime."

In relevant part, 18 U.S.C. § 3663A(3) provides that "[t]he court shall also order, if agreed to by the parties in the plea agreement, restitution to persons other than the victim of the offense."

STATEMENT OF THE CASE

A. Introduction

As this Court recently instructed, "[a] valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope." *Garza v. Idaho*, __ U.S. __, 139

S.Ct. 738, 744 (2019) (internal citation omitted) (holding that prejudice of counsel's ineffectiveness is presumed where counsel fails to file a notice of appeal as directed by his client, notwithstanding existence of appellate waiver). This is because "plea bargains are essentially contracts." *Id.*

In *Garza*, this Court recognized that "all jurisdictions appear to treat at least some claims as unwaiveable," *id.* at 745, including a claim that the sentence is illegal, but declined to make a statement "on what particular exceptions may be required." *Id.* at 745. Without any direction from this Court, the circuits are deeply divided concerning whether a defendant may appeal from an illegal restitution order notwithstanding a waiver of the right to appeal his sentence. That such a waiver expressly permits an appeal of a sentence exceeding statutory limits does not protect defendant's appellate rights in a number of circuits, including the Third Circuit.

In this case, the Third Circuit, eschewing its promise to "strictly construe the text against it when it has drafted the agreement," *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000), declined to reach the merits of Mr. Bernal's challenge to a plainly illegal restitution order in the amount of $5,250. While the government at one point conceded that this restitution order was neither authorized by statute nor contemplated by Mr. Bernal's plea agreement, when Mr. Bernal complained of this illegal portion of his sentence on appeal, the government nevertheless successfully moved for summary affirmance based on an appellate waiver. This was so notwithstanding the waiver's express reservation of the right to appeal a sentence that exceeded that authorized by statute.

Had his appeal arisen in one of the majority of other circuits, Mr. Bernal would have been entitled to merits review of his claim that the restitution order was illegal. Although applying the minority approach, the Third Circuit's enforcement of an appellate waiver to protect an illegal restitution order is an approach shared by a number of other circuits. Criminal defendants who enter plea agreements implicitly guaranteeing that they be sentenced in accordance with law, and reserving the right to challenge a sentence that exceeds that authorized by statute, are at once held to their end of the bargain while being denied the legal sentence that served as consideration for their agreement to the government's terms.

A restitution order is part of a criminal sentence. A court does not have power to order restitution absent express statutory authority. Appellate waivers are ubiquitous. Restitution is one of a number of financial burdens on criminal defendants, with financial obligations severely increasing. This Court should grant certiorari to resolve the persistent divide among the circuits concerning the important question of whether a criminal defendant who waives his right to appeal his sentence may appeal may nonetheless appeal an unlawful restitution order.

B. Factual and Procedural History

Robert Bernal, Jr. was convicted by plea of guilty to one count of distribution of material depicting the sexual exploitation of a minor, in violation of 18 U.S.C. § 2252(a)(2). As part of the plea agreement, the government agreed to dismiss Counts Two and Three of the indictment at sentencing (hereinafter "the to-be-dismissed counts"). At the same time, Mr. Bernal "acknowledge[d] his responsibility for the

conduct charged" at the to-be-dismissed counts, and "stipulate[d]" that the conduct charged in those counts may be "considered by . . . the Court in calculating the guideline range and imposing sentence."

The three paragraphs of Mr. Bernal's plea agreement explicitly referencing restitution reflected the parties' intent that restitution be ordered in accordance with the relevant statutes, with no bargained-for expansion of Mr. Bernal's restitution obligations as to victims of to-be-dismissed counts. Specifically, the agreement provided: (1) that Mr. Bernal would "pay mandatory restitution under the Victim-Witness Protection Act, 18 U.S.C. § 3663, 3663A and 3664, to the victims and/or other persons or parties authorized by law in such amounts, at such times, and according to such terms as the Court shall direct;" (2) that "[t]he penalty that may be imposed upon Robert Bernal, Jr., at Count One is . . . (f) Mandatory restitution under the Victim-Witness Protection Act, 18 U.S.C. §§ 3663, 3663A and 3664; and (3) that "[t]he Court shall determine the victims and/or other persons or parties who will receive restitution as authorized by law." There was no express provision in the plea agreement authorizing restitution for victims of the to-be-dismissed counts.

In relevant part, 18 U.S.C. § 2259 authorizes restitution orders in the full amount of the victim's losses in cases where "the defendant was convicted of trafficking in child pornography," where "victim" is defined as "the individual harmed as a result of a commission of a crime." 18 U.S.C. § 3663A(3) provides that "[t]he court shall also order, if agreed to by the parties in the plea agreement, restitution to persons other than the victim of the offense."

The victim of the offense of conviction did not seek restitution in this case. Victims of the to-be-dismissed counts made requests for restitution. Prior to sentencing, the court issued an order reflecting its belief that the plea agreement authorized a restitution order for the conduct charged at the to-be-dismissed counts. The government initially took the position that the victims of the conduct underlying the to-be-dismissed counts were "not entitled to restitution." Counsel for Mr. Bernal filed a position consistent with the position taken by the government.

The government later changed tacks, arguing, for the first time, that the court could order restitution for the victims of the to-be-dismissed counts despite the plea agreement's silence on the issue. The government advocated for an order of restitution totaling $15,575. Counsel for Mr. Bernal opposed that request, arguing that the plea agreement did not provide for an order of restitution for victims of to-be-dismissed counts.

At sentencing, the court found that "the mandatory restitution to victims under" 18 U.S.C. § 2259 "is not applicable because the statute applies only to victims of the offense of conviction and no restitution requests have been received as to victims as to Count 1." That ruling was correct. As this Court has held, "a straightforward reading of § 2259(c) indicates that the term "a crime" refers to the offense of conviction." *Paroline v. United States*, 572 U.S. 434, 445 (2014) (citing *Hughey v. United States*, 495 U.S. 411, 416 (1990)). However, the court then analyzed the plea agreement and found that the language permitting the court to "consider" the conduct charged at the to-be-dismissed counts in imposing sentence authorized

an "award of restitution to the victims of defendant's conduct charged in Counts 2 and 3," and ultimately imposed a restitution order in the amount of $5,250.

Mr. Bernal filed a notice of appeal with the intention of challenging the unforeseen, and legally impermissible restitution order. With respect to the right to appeal, Mr. Bernal's plea agreement provided that he "waive[d] his right to take a direct appeal from his conviction or sentence under 28 U.S.C. § 1291 or 18 U.S.C. § 3742" subject to an exception providing that "if . . . the sentence exceeds the applicable statutory limits set forth in the United States Code, . . . Robert Bernal, Jr., may take a direct appeal from the sentence."

Before the filing of appellant's brief, the government filed a motion to enforce the appellate waiver and for summary affirmance. Mr. Bernal opposed the government's request, arguing that his sole claim on appeal was that the restitution order portion of his sentence was illegal, and that the exception to the appellate waiver allowing for appeal of a sentence that "exceeds the applicable statutory limits set forth in the United States Code" permitted merits review of his appeal. The government filed no reply to Mr. Bernal's opposition. Nonetheless, the Third Circuit granted the motion to enforce the appellate waiver and summarily affirmed in a December 20, 2019, order providing no explanation for its decision. Mr. Bernal petitioned for rehearing *en banc*, which the Third Circuit denied.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split on the Question of Whether a Waiver of the Right to Appeal a Sentence Bars an Appeal of an Unlawful Restitution Order.

The question presented in this case has been addressed by every circuit, yielding a deep and enduring circuit split. By dismissing the instant appeal, the Third Circuit adhered to its prior holding in *United States v. Perez*, 514 F.3d 296 (3d Cir. 2007), that "[b]y waiving his right to appeal his criminal sentence," a criminal defendant "waive[s] his right to appeal the restitution order," *id.* at 298, which it applied notwithstanding Mr. Bernal's claim that his restitution order was illegal. *See also United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (adopting a "miscarriage of justice" exception to enforcing appellate waivers, while "choos[ing] not to earmark specific situations" that would satisfy that standard). Four other circuits – the First, Sixth, Seventh, and Eleventh – have reached the same conclusion, generally based on the notion that a restitution order, while part of the sentence, is not subject to a statutory maximum and thus falls within appellate waivers, notwithstanding defendant's right to challenge a sentence that exceeds the statutory maximum. *See United States v. Okoye*, 731 F.3d 46 (1st Cir. 2013) (waiver of right to appeal sentence barred appeal of restitution order); *United States v. Grundy*, 844 F.3d 613, 617 (6th Cir. 2016) (holding that waiver of right to appeal unless sentence exceeded maximum barred right to appeal restitution order because there is no

statutory maximum for restitution);[1] *United States v. Berman*, 235 F.3d 1049, 1052 (7th Cir. 2000) (recognizing that "[a]n agreement waiving appeal from 'any sentence within the maximum provided in Title 18' or similar language would foreclose the arguments Berman now presents, but, just as we are willing to enforce waivers of appeal, we enforce them only to the extent of the agreement"); *United States v. Johnson*, 541 F.3d 1064, 1069 (11th Cir. 2008) (holding that appeal of untimely restitution order fell within the scope of waiver of right to appeal sentence because restitution statute has no prescribed statutory maximum).

The remaining seven circuits – the Second, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia – hold that a defendant may appeal an unlawful restitution order notwithstanding a waiver of the right to appeal his sentence. *See United States v. Oladimeji*, 463 F.3d 152, 157 (2d Cir. 2006) (holding that defendant's "appeal of his restitution order is not covered by the applicable appeal-waiver provision"); *United States v. Broughton-Jones,* 71 F.3d 1143, 1147 (4th Cir. 1995) ("Because a restitution order imposed when it is not authorized ... is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum [such] appeals ... are similarly outside the scope of a defendant's otherwise valid appeal waiver."); *United States v. Leal*, 933 F.3d 426 (5th Cir. 2019) (holding that *Paroline*-based appeal of restitution order was an appeal of a sentence exceeding the statutory maximum punishment, and thus beyond the scope of the appellate waiver); *United*

[1] *Compare United States v. Freeman*, 640 F.3d 180 (6th Cir. 2011) (holding that defendant did not waive right to appeal a restitution order that was based on losses exceeding those caused by the conduct underlying the offense of conviction).

States v. Sistrunk, 432 F.3d 917 (8th Cir. 2006) (waiver of right to appeal sentence did not include waiver of right to appeal restitution order); *United States v. Gordon,* 393 F.3d 1044, 1050 (9th Cir. 2004) ("A restitution order which exceeds its authority under MVRA is equivalent to an illegal sentence. Such a restitution order is in excess of the maximum penalty provided by statute and, therefore, the waiver of appeal is inapplicable to it.") (internal citations, alterations, and quotations omitted); *United States v. Gordon*, 480 F.3d 1205, 1210 (10th Cir. 2007) (holding that expectation that defendant would receive a legal sentence was "implied term of the agreement," and consequently, that defendant's "challenge to the lawfulness of the restitution order is beyond the scope of the waiver of appellate rights."); *In re Sealed Case*, 702 F.3d 59, 64 (D.C. Cir. 2012) (appeal of restitution order outside scope of waiver of right to appeal sentence which did not specifically reference restitution order). These cases generally recognize that a restitution order that exceeds statutory authority is no different from an illegal sentence, and is thus appealable notwithstanding an appeal waiver provision. *See, e.g., Gordon,* 393 F.3d at 1050.

II. The Decision Below Is Wrong.

Among the assurances given to Mr. Bernal when he entered a plea agreement with the United States were a legal sentence and the right to appeal his sentence if it exceeded statutory limits set by Congress. The district court imposed a $5,250 restitution order that all acknowledged was not authorized by Congress under 18 U.S.C. § 2259. Invoking 18 U.S.C. § 3663A(3), the court construed the plea agreement in a manner that surprised everyone, including the government, who had drafted the

agreement. The issue on appeal was whether the restitution order was illegal. Notwithstanding the plea agreement's promise of the right to appeal his sentence if it exceeded statutory limits, the government moved to enforce the appellate waiver and for summary affirmance. Mr. Bernal opposed the motion, on the grounds that his appeal fell outside the scope of the waiver. The Third Circuit granted the government's motion without explanation, and denied Mr. Bernal's motion for rehearing *en banc*.

The Third Circuit's denial of Mr. Bernal's right to appeal his restitution order on grounds that the order was not authorized by law was fundamentally unfair where, in imposing restitution, the district court gave the plea agreement a reading that was both unanticipated by the parties and not expressly provided for in its text. If the district court was wrong, as Mr. Bernal contended on appeal, the $5,250 financial obligation imposed on him was entirely illegal. Enforcement of an appellate waiver denied him a benefit he was clearly promised – the right to challenge an illegal sentence, if imposed.

"[W]e construe [plea] agreement[s] against a general backdrop understanding of legality." *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996). *See also Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("Since a general rule of construction presumes the legality and enforceability of contracts, 6A A. Corbin, Contracts §§ 1499, 1533 (1962), ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable"). Mr. Mr. Bernal was "entitled

to presume, when [he] entered the plea agreement, that the judge would order restitution in a legal manner." *Gordon*, 480 F.3d at 1210. *See also* E. Allen Farnsworth, *Farnsworth on Contracts* § 9.2 (3d ed.2004) (noting that "existing law is part of the state of facts at the time of agreement" and that a mistake of fact is grounds for relief). That all components of Mr. Bernal's sentence would be legal – including any prison term, supervised release term, restitution order, and fine – was thus an implied term of his agreement. That Mr. Bernal was at once denied the most critical implied term in his plea agreement, and subsequently denied a procedure for challenging the denial of his rights under the agreement and the law, defies the basic contract principles underpinning plea bargaining.

A number of harms result when sentencing errors remain uncorrected because of waiver clauses. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 250 (2005). First, and relevant here, defendants are barred from raising valid claims and punished illegally in violation of a statute. *Id.* As the Eleventh Circuit has recognized, "[a] waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues – indeed, it includes a waiver of the right to appeal blatant error." *United States v. Howle*, 166 F.3d 1166 (11th Cir. 1999). Inconsistent application of the waivers in this context means that criminal defendants engaged in plea bargaining face uncertainty as to whether an illegal sentence may be challenged on appeal, while their plea agreements, by their terms, inaccurately assuage concerns of this risk. This Court

should grant certiorari to resolve this important question and provide needed transparency to the plea bargaining process and appellate waiver jurisprudence.

III. The Question Presented Is Important and Recurs Frequently.

The importance of this issue – whether a defendant who waives his right to appeal his sentence waives his right to appeal an illegal portion of his sentence – is clear. Given the prevalence of appeal waivers in modern plea agreements, the minority position would effectively preclude appellate review of even illegal restitution orders. *See, e.g.,* King & O'Neill, *supra*, at 231, 232 fig.7 (observing that 90% of plea agreements in the Circuit and 65% of plea agreements across all circuits include appeal waivers).

What is more, restitution plays an increasing role in federal criminal sentencing. Before the passage of the Victim and Witness Protection Act of 1982, 96 Stat. 1248, and the Mandatory Victims Restitution Act of 1996, 110 Stat. 1227, restitution orders were comparatively rare. But from 2014 to 2016, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution. GAO, G. Goodwin, Federal Criminal Restitution 16 (GAO-18-203, 2018). And between 1996 and 2016, the amount of unpaid federal criminal restitution rose from less than $6 billion to more than $110 billion. GAO, G. Goodwin, Federal Criminal Restitution 14 (GAO-18-115, 2017); Dept. of Justice, C. DiBattiste, U.S. Attorneys Annual Statistical Report 79-80 (1996) (Tables 12A and 12B).

The ubiquity of both appellate waivers and restitution orders means that the inconsistency bread by the circuit split on this question is sure to persist with significant impact for criminal defendants in the absence of direction from this Court.

IV. This Case Represents an Ideal Vehicle for Addressing This Important Question.

This case squarely presents the question whether an appeal waiver bars review of a defendant's claim that his restitution order is not authorized by statute, and thus illegal. There is good reason to believe that Mr. Bernal would prevail on his claim should the court of appeals review it. The district court entered the restitution order in this case under the logic that the parties had bargained for such a result. However, the plea agreement itself did not address restitution for victims of to-be-dismissed counts and the government's positions at sentencing revealed that even the government, as drafter of the plea agreement, had not anticipated that its language could be invoked to order restitution for such victims. Surely § 3663A(3) requires more by way of an express agreement to restitution for victims other than those of the offense of conviction. The wholesale denial of Mr. Bernal's right to appeal his sentence resulted in the Third Circuit's failure to correct a restitution order that clearly was not authorized by statute.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

Dated: July 30, 2020

Respectfully submitted,

/s/ Lisa B. Freeland

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CERTIFICATE OF MEMBERSHIP IN BAR

I, LISA B. FREELAND, Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

/s/ Lisa B. Freeland
LISA B. FREELAND
Federal Public Defender

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DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I hereby declare on penalty of perjury that on the below listed date, as required by Supreme Court Rule 29, the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari were delivered to a third party commercial carrier for next day delivery to the Clerk of the United States Supreme Court in Washington, D.C., postage and fees paid via Federal Express, on July 30, 2020, which is timely pursuant to the rules of this Court. The names and addresses of those served in this manner are as follows:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

DATE: July 30, 2020

BY: */s/ Lisa B. Freeland*
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